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Counsel to the Debtors and  
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IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE EASTERN DISTRICT OF VIRGINIA  
 RICHMOND DIVISION

- - - - - x  
 In re: : Chapter 11  
 :  
 CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :  
 :  
 Debtors. : Jointly Administered  
 - - - - - x

**DEBTORS' OBJECTION TO CLAIM OF PANASONIC  
 CORPORATION OF NORTH AMERICA (CLAIM NO. 1254)**

The debtors and debtors in possession in the  
 above-captioned cases (collectively, the "Debtors")<sup>1</sup>

<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC

(cont'd)

hereby object to claim no 1254 filed by Panasonic Corporation of North America (the "Objection"), and move this Court, pursuant to sections 105 and 503(b)(9) of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (as amended, the "Bankruptcy Code"), Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Local Bankruptcy Rule 3007-1 for entry of an order, the proposed form of which is attached hereto, reclassifying such claim to a general unsecured non-priority claim. In support of this Objection, the Debtors respectfully state as follows:

#### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Objection under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of

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Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, INC. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 4951 Lake Brook Drive, Glen Allen, VA 23060.

these cases and this Objection in this district is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory and legal predicates for the relief requested herein are Bankruptcy Code sections 105 and 503(b)(9), Bankruptcy Rule 3007 and Local Bankruptcy Rule 3007-1.

#### **BACKGROUND**

##### **A. General Case Background.**

1. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

2. On November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

3. On January 16, 2009, the Court authorized the Debtors, among other things, to conduct going out of business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency Agreement")

between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores. The going out of business sales concluded on or about March 8, 2009.

**B. The Panasonic Claim.**

4. Circuit City Stores, Inc. ("Circuit City") and Panasonic Consumer Electronics Company, a division of Panasonic Corporation of North America ("Panasonic") are parties to a consignment agreement, dated March 8, 2006 and amended February 2008 (the "Consignment Agreement"). A copy of the Consignment Agreement is attached hereto as Exhibit A.

5. Pursuant to the Consignment Agreement, Panasonic agreed to provide certain goods to Circuit City on a consignment basis ("Consigned Goods"). As further described in Section 4 of the Consignment Agreement, Consigned Goods were physically delivered to Circuit City's warehouses and stores. While Circuit City received the goods upon delivery to its warehouses and stores, the Consignment Agreement provided that

Panasonic retained title to the Consigned Goods until the time that Circuit City sold the Consigned Goods to customers. At the time of sale, title to the sold Consigned Goods passes to Circuit City and then to the customer as part of a simultaneous transaction. See Consignment Agreement, § 1(b).

6. On December 17, 2008, Panasonic filed the a claim -- numbered 1254 -- pursuant to Bankruptcy Code section 503(b)(9) in the amount of \$9,334,327.43 ("Claim No. 1254" or the "Panasonic Claim"), allegedly based on certain of the Consigned Goods sold to the Debtors' during the 20 day period prior to the Petition Date. A true and correct copy of Claim No. 1254 is attached hereto as Exhibit B.

7. With respect to Claim No. 1254, Panasonic contends that the Consigned Goods were received by Circuit City during the 20 day period prior to the Petition Date. Specifically, Claim No. 1254 states that:

Under the Consignment Agreement, '[t]itle to the Consigned Products . . . shall remain in Panasonic until such time as the products are sold by Circuit City to its customers . . . At the point of sale to

Customers, title to the Consigned Products first shall pass to Circuit City and then to the Customer as part of a simultaneous transaction.' Therefore, for the purposes of section 503(b)(9) of the Bankruptcy Code, the Consigned Products were 'received by' and 'sold to' Circuit City at the time that Circuit City sold the Consigned Products to its Customers.

See Claim No. 1254, Attachment to 503(b)(9) Proof of Administrative Expense of Panasonic Corporation of North America (emphasis added).<sup>2</sup> Thus, Panasonic is focusing on date title to the Consigned Goods transferred to Circuit City, as opposed to the date Circuit City physically received the goods, for purposes of determining when the Debtors' "received" such goods. Consequently, even if the Consigned Goods were physically received by the Debtors outside of the twenty-day period prior to the Petition Date, Panasonic contends the Claim is entitled to administrative priority.

8. Finally, although Panasonic filed the Claim, Panasonic did not make a reclamation demand upon

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<sup>2</sup> Additionally, Panasonic attached a "Bill of Lading" to Claim No. 1254, but the Bill of Lading did not provide any specifics concerning the goods shipped.

Circuit City under Bankruptcy Code section 546(c) on account of the Consigned Goods.

**RELIEF REQUESTED**

9. By this Objection, the Debtors seek entry of an order reclassifying the Panasonic Claim to a general unsecured non-priority claim.

**BASIS FOR RELIEF**

10. Currently, the Debtors are engaged in a thorough review of all claims filed against their estates, including administrative expense claims, to determine the validity of such claims. As part of this process, the Debtors are diligently reviewing claims filed pursuant to Bankruptcy Code section 503(b)(9).

11. After reviewing the Panasonic Claim, its supporting documentation, and the Debtors' books and records, the Debtors have determined that the Panasonic Claim does not satisfy the requirements of Bankruptcy Code section 503(b)(9). Specifically, Panasonic has failed to meet its burden under section 503(b)(9) to demonstrate that the Consigned Goods upon which it bases its alleged section 503(b)(9) claims were "received" by Circuit City during the twenty-day period prior to the

Petition Date. Therefore, Panasonic has failed to establish a valid section 503(b)(9) claim. Accordingly, the Panasonic Claim should be reclassified in its entirety as a general unsecured non-priority claim.

#### **APPLICABLE AUTHORITY**

**I. PANASONIC HAS THE BURDEN TO DEMONSTRATE THAT IT HAS SATISFIED ALL ELEMENTS OF SECTION 503(B)(9) WITH RESPECT TO THE PANASONIC CLAIM.**

12. Courts in the Fourth Circuit have repeatedly held that the claimant has the burden of proof on all elements of an administrative expense claim. See, e.g., Ford Motor Credit Co. v. Dobbins, 35 F.3d 860, 866 (4th Cir. 1994) (quoting In re Mid Region Petroleum, Inc., 1 F.3d 1130, 1132 (10th Cir. 1993)) ("the party claiming entitlement to administrative expense priority [under § 503(b)] has the burden of proof"); see also In re Wetco Rest. Group, LLC, No. 07-51169, 2008 WL 1848779, \*4 (Bankr. W.D. La. Apr. 23, 2008) (the claimant has the "burden to establish that the value of the 20-Day Goods qualifies for administrative expense treatment under section 503(b)(9)"). In evaluating administrative expense claim requests, court should remain mindful that "[t]he



presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among the creditors." Ford Motor Credit Co. v. Dobbins, 35 F.3d at 865 (quoting In re James B. Downing & Co., 94 B.R. 515, 519 (Bankr. N.D. Ill. 1988)); see also City of White Plains v. A&S Galleria Real Estate, Inc. (In re Federated Dep't Stores, Inc.), 270 F.3d 994, 1000 (6th Cir. 2001). Thus, this Court should interpret section 503(b)(9) narrowly and in accordance with its plain meaning. See Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6, (2000) "Congress says in a statute is what it means and means in a statute what it says there." (internal quotations omitted); In re NVR, LP, 189 F.3d 442, 457 (4th Cir. 1999) (holding that the Bankruptcy Code must be interpreted in accordance with its plain meaning using the ordinary understanding of words); In re Amireh, 2008 WL 52706, \*4 (Bankr. E.D. Va. 2008) ("The court will not expand the reach of the statute beyond the language chosen by Congress.").

13. Here, Panasonic contends that the Claim is entitled to administrative expense priority under Bankruptcy Code section 503(b)(9), which provides:

(b) After notice and a hearing, there shall be allowed administrative expenses, . . . including . . .

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

11 U.S.C. § 503(b)(9) (emphasis added).

14. Therefore, in order to meet its burden of proof with respect to Claim No. 1254, Panasonic must establish, among other things, that the Consigned Goods upon which the claim is based were "received" by the Debtors during the twenty-day period prior to the Petition Date.

15. As discussed below, Panasonic cannot meet its burden because it has provided no evidence that the Consigned Goods were physically received by the Debtors within the twenty-day period prior to the Petition Date, as required by section 503(b)(9). Consequently, the Panasonic Claim should be reclassified in its entirety as a general unsecured non-priority claim.

**II. PANASONIC HAS FAILED TO ESTABLISH THAT THE  
CONSIGNEED GOODS WERE "RECEIVED" DURING THE TWENTY-  
DAY PERIOD PRIOR TO THE PETITION DATE.**

16. As set forth above, Bankruptcy Code section 503(b)(9) provides administrative expense priority treatment to claims for "the value of any goods received by the debtor within 20 days before the date of commencement of a case . . . ." 11 U.S.C. § 503(b)(9) (emphasis added). While the Bankruptcy Code does not define the term "received," courts that have interpreted the meaning of "received" have adopted the Uniform Commercial Code's (the "U.C.C.") definition of "receipt". See In re Pridgen, 2008 WL 1836950 at \*4 (Bankr. E.D.N.C., Apr. 22, 2008); see also In re Plastech Engineered Products, Inc., 2008 WL 5233014 at \*4 (Bankr. E.D. Mich. Oct. 7, 2008) (discussing Pridgen and indicating in dictum that existence of section 503(b)(9) claim turned on whether debtor or its agent had "received" goods by taking "actual physical possession").

17. The Virginia U.C.C. defines "receipt" of goods as "taking physical possession of them." Va. Code Ann. § 8.2-103(1)(c). In interpreting the identical

definition in the North Carolina U.C.C. in the context of a consignment agreement, the Pridgen court's holding and analysis are instructive.

18. In Pridgen, a gasoline vendor contracted with the debtor/dealer to sell his product and then invoiced the debtor once the gasoline had been dispensed to consumers. The parties acknowledged that title to the gasoline did not transfer to the debtor until the gasoline was sold to consumers, which, in that instance, was within 20-days of the petition date. On these facts, the Pridgen court held that the claimant had not met its burden of proof because section 503(b)(9) is not dependent on transfer of ownership, but rather physical "receipt" of goods by the debtor. In re Pridgen, 2008 WL 1836950 at \*1-4. Accordingly, the claimant was not entitled to a claim under Bankruptcy Code section 503(b)(9). Id.

19. Additionally, courts have also interpreted "receipt" in the context of section 546(c) -- which governs reclamation -- to mean physical receipt of the goods. See, e.g., In re R.F. Cunningham & Co, Inc., 2006 Bankr. LEXIS 3650, at \*6 (Bankr. E.D.N.Y. Dec. 21, 2006)

(noting that "receipt" is defined as taking physical possession of goods and that a buyer does not have physical possession of goods while they are in transit); see also Montello Oil Corp. v. Marin Motor Oil, Inc. (In re Marin Motor Oil, Inc.), 740 F.2d 220, 225-226 (3d Cir. 1984) (holding that receipt, within the meaning of 11 U.S.C. § 546(c) requires physical possession and is not satisfied by mere transfer of title or risk of loss). As this Court well knows, similar words used in the same statute should be interpreted similarly. See, e.g., Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 478-49 (1992) (citing general canon of construction that counsels a similar interpretation of similar terms in the same statute); see also Sullivan v. Stroop, 496 U.S. 478k 484 (1990) ("[I]dential words used in different parts of the same statute are intended to have the same meaning"). This is especially true in these circumstances because section 503(b)(9) was passed as part amendments to section 546(c). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, section 1227; see also Kenneth N. Klee, Chapter 11 Business Reorganizations: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 - Business Bankruptcy Amendments, Course No. SK092 ALI-ABA Course of Study Materials (2005) (section 503(b)(9) "appears to be intended to allow certain

sellers that do not properly seek reclamation in accordance with section 546(c) to have an administrative expense claim for the value of such goods.").

20. Moreover, the express language of the Consignment Agreement supports the conclusion that "received" means physical receipt of the Consigned Goods. Specifically, the Consignment Agreement provides that "Upon receipt of the Consigned Goods from Panasonic's carrier, Circuit City will issue a Confirmation Report detailing the quantity of products received at the applicable Distribution Center or other location." Consignment Agreement, § 4(b). In contrast, section 1(b) of the Consignment Agreement -- the section that addresses sale and transfer of title -- does not include either the word "receipt" or "received". Thus, it follows that Circuit City and Panasonic separated the concepts of title transfer and receipt of goods.

21. Notwithstanding authority to the contrary and the Consignment Agreement itself, Panasonic contends that physical receipt is irrelevant. Instead, Panasonic contends the operative fact is title transfer. Because title to any Consigned Goods did not transfer until

Circuit City sold such goods to its customers, Panasonic contends that the Consigned Goods were not "received" by Circuit City until the sale date. Specifically, in the attachment submitted in support of the Panasonic Claim, Panasonic states that "for the purposes of section 503(b)(9) of the Bankruptcy Code, the Consigned Products were 'received by' and 'sold to' Circuit City at the time that Circuit City sold the Consigned Products to its Customers." See Claim No. 1254, Attachment to 503(b)(9) Proof of Administrative Expense of Panasonic Corporation of North America (emphasis added).

22. Panasonic's contention is based on the mistaken premise that the term "received" relates to the transfer of title of the Consigned Goods from Panasonic to Circuit City, instead of actual physical receipt. Passage of title, however, is irrelevant with regard to when goods are "received" for purposes of section 503(b)(9). See Pridgen, 2008 WL 1836950 at \*4; Plastech, 2008 WL 5233014 at \*4. Indeed, as discussed above, the Consignment Agreement itself expressly differentiated between the two concepts by using the words "title" and "received" in different sections of the Consignment

Agreement, as well as in different contexts. Compare, Consignment Agreement § 1(b) (addressing title transfer), with, Consignment Agreement § 4(b) (addressing receipt of goods).

23. Moreover, Panasonic has offered no evidence that Circuit City took physical possession of the Consigned Goods upon which the Panasonic Claim is based within the twenty-day period prior to the Petition Date.<sup>3</sup> Consequently, Panasonic has failed to meet its burden to establish the validity of its alleged section 503(b)(9) claim.

24. Accordingly, the Panasonic Claim should be reclassified in its entirety as a general unsecured non-priority claim.

#### **RESERVATION OF RIGHTS**

25. At this time, the Debtors have not completed their review of the validity of all claims/expenses filed against their estates, including the Claim No. 1254 and all other claims asserted by

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<sup>3</sup> Paragraph 28 of the Consignment Agreement provides that the Agreement shall be governed and controlled in all respects by the laws of the Commonwealth of Virginia.



Panasonic. To that end, the Debtors reserve the right to further object to Claim No. 1254 and any and all claims, whether or not the subject of this Objection, for allowance, voting, and/or distribution purposes, and on any other grounds. Furthermore, the Debtors reserve the right to modify, supplement and/or amend this Objection as it pertains to any claim of Panasonic.

#### **NOTICE**

26. Notice of this Objection has been provided to Panasonic and to parties-in-interest in accordance with the Court's Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management and Administrative Procedures (Docket No. 130) (the "Case Management Order"). The Debtors submit that, under the circumstances, no other or further notice need be given.

#### **WAIVER OF MEMORANDUM OF LAW**

27. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Objection, the Debtors request that the

requirement that all motions be accompanied by a written memorandum of law be waived.

**NO PRIOR RELIEF**

28. No previous request for the relief sought herein has been made to this Court or any other court.

**CONCLUSIONS**

WHEREFORE, the Debtors request the Court to enter an Order sustaining this Objection and granting such other and further relief as the Court deems appropriate.

Dated: Richmond, Virginia SKADDEN, ARPS, SLATE, MEAGHER &  
August 25, 2009 FLOM, LLP  
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Counsel for Debtors and Debtors  
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**EXHIBIT A**

**(Consignment Agreement)**

**EXHIBIT B**

**(Panasonic Claim No. 1254)**

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Counsel to the Debtors and  
 Debtors in Possession

IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE EASTERN DISTRICT OF VIRGINIA  
 RICHMOND DIVISION

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 In re: : Chapter 11  
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 CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :  
 :  
 Debtors. : Jointly Administered  
 - - - - - X

**ORDER SUSTAINING DEBTORS' OBJECTION TO CLAIM OF  
 PANASONIC CORPORATION OF NORTH AMERICA (CLAIM NO. 1254)**

THIS MATTER having come before the Court on the  
 Debtors' Objection to Claim of Panasonic Corporation of  
 North America (Claim No. 1254) (the "Objection"); and it  
 appearing that due and proper notice and service of the  
 Objection as set forth therein was good and sufficient

and that no other further notice or service of the Objection need be given; and the Court having reviewed the Objection, Claim No. 1254, a response, if any, and all related documents; and it appearing that the relief requested on the Objection is in the best interest of the Debtors, their estates and creditors and other parties-in-interest; and after due deliberation thereon good and sufficient cause exists for the granting of the relief as set forth herein,

**IT IS HEREBY ORDERED ADJUDGED AND DECREED THAT:**

1. The Objection is SUSTAINED.
2. Claim No. 1254 filed by Panasonic Corporation of North America is reclassified in its entirety to a general unsecured non-priority claims.
3. The Debtors' rights to file additional objections to Claim No. 1254 and any other claim of Panasonic (filed or not) that have been or may be asserted against the Debtors, and to seek reduction of such claims on any valid basis are expressly preserved.

4. This Court shall retain jurisdiction to hear and determine all matters arising from or related to implementation or interpretation of this Order.

Dated: Richmond, Virginia  
September \_\_\_\_, 2009

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HONORABLE KEVIN R. HUENNEKENS  
UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

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Counsel to the Debtors  
and Debtors in Possession

**CERTIFICATION OF ENDORSEMENT UNDER LOCAL RULE 9022-1(C)**

Pursuant to Local Bankruptcy Rule 9022-1(C), I  
hereby certify that the foregoing proposed order has  
been endorsed by or served upon all necessary parties.

/s/ Douglas M. Foley  
Douglas M. Foley

